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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No._____

DAVID D. LEWIS and JACKSON, RIVES and PETTUS,
Petitioners,
(DAVID D. LEWIS—*Appellant Below*)
(JACKSON, RIVES and PETTUS—*Appellant and Intervener Below*)

versus

RAILROAD RETIREMENT BOARD, *Respondent*
(*Appellee Below*)

PETITION FOR WRIT OF *CERTIORARI* TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show as follows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an interpleader suit in equity. The Court below affirmed a decree of the trial Court awarding the fund in controversy of Twelve Hundred Thirteen Dollars and

Twenty-Five Cents ($1213.25) which had been paid into the registry of the trial Court to the claimant, respondent Railroad Retirement Board, and denied in whole and in part to the claimant, petitioner David D. Lewis and the intervening law firm, petitioner Jackson, Rives & Pettus, any right to such fund. (R. 72-75). The petitioner David D. Lewis and the intervening law firm of Jackson, Rives & Pettus have petitioned this Court for *certiorari*. For convenience the petitioners, David D. Lewis and Jackson, Rives & Pettus, will be referred to herein respectively as petitioner and intervener. The Railroad Retirement Board will be referred to as respondent.

The fund in controversy of Twelve Hundred Thirteen Dollars and Twenty-Five Cents ($1213.25) represents the amount withheld by the Louisville & Nashville Railroad Company from payment on a judgment recovered in the Circuit Court of Jefferson County, Alabama in Case No. 18,372-X by petitioner against the railroad company for personal injuries under the Federal Employers Liability Act in the amount of Thirty-Seven Thousand Five Hundred Dollars ($37,500.00) (R. 4, 5, 10). The railroad company paid Thirty Six Thousand Two Hundred Eighty Six Dollars and Seventy Five Cents ($36,286.75) to petitioner in partial payment of said judgment, but at the instance of the respondent withheld the sum of Twelve Hundred Thirteen Dollars and Twenty Five Cents ($1213.25) which was subsequently paid into the registry of the trial Court in the instant interpleader suit. (R. 4, 5, 10, 16).

The claims of the respective parties asserted against the fund in controversy of Twelve Hundred Thirteen Dollars and Twenty Five Cents ($1213.25) are as follows:

Respondent Railroad Retirement Board claims a lien against the entire fund under Sec. 12 (o) of the Railroad Unemployment Insurance Act, Title 45, U. S. C. A., Sec. 362 (o). (R. 10-13). Petitioner and intervener claim a charge against the fund for a proportionate share of attor-

ney's fees and other expenses incurred in reducing petitioner's personal injury claim to judgment thereby diminishing the amount of the fund subject to respondent's lien by the reasonable and necessary expenses incurred in bringing it into existence. (R. 4-7, 23-25).

The lien asserted by the respondent is based upon sickness benefit payments made to petitioner under the Federal Railroad Unemployment Insurance Act, Title 45, U. S. C. A., Sec. 362 (o). Petitioner received sickness benefits under such Act by checks issued from time to time from March 26, 1948 to September 29, 1949, inclusive, aggregating Twelve Hundred Thirteen Dollars and Twenty Five Cents ($1213.25). (R. 92, 93). The sickness benefits were paid on account of petitioner's absence from work as a result of personal injuries received by him on February 25, 1948, for which he recovered said judgment of Thirty Seven Thousand Five Hundred Dollars ($37,500.00) against the Louisville & Nashville Railroad Company in Case No. 18,372-X in the Circuit Court of Jefferson County, Alabama on October 3, 1949. (R.92, 93). By letter dated August 13, 1948 respondent advised Louisville & Nashville Railroad Company that the respondent claimed a "right to reimbursement from any sum payable by you on account of a liability based on this employee's infirmity." (R. 48, 49). No specific amount was claimed in this letter as being subject to lien. No further communication ensued between the respondent and the railroad company until October 8th, 1949, when the railroad company requested respondent to advise the amount of benefits petitioner had received. (R. 51). On October 10, 1949 respondent advised the railroad company by telegram that sickness benefits amounting to One Hundred Twenty Eight Dollars and Twenty Five Cents ($128.25) had been paid to petitioner. (R. 52). Subsequently on October 13, 1949 respondent informed the railroad company that the correct amount was Twelve Hundred Thir-

teen Dollars and Twenty Five Cents ($1213.25) instead of One Hundred Twenty Eight Dollars and Twenty Five Cents ($128.25). (R. 52, 53).

Petitioner employed the intervener law firm as his attorneys to represent him in prosecuting his claim for personal injuries under the Federal Employer's Liability Act against the Louisville & Nashville Railroad Company with the agreement that the attorney's fee of intervener would be a contingent fee of an amount equal to twenty five per cent (25%) of the amount recovered after deduction of expenses of prosecuting the claim. (R. 29, 30, 32). It was admitted in open court at the hearing of this case that a contingent fee in such amount was a reasonable fee. (R. 33).

The complaint was filed by the intervener as attorneys for petitioner against the Louisville & Nashville Railroad Company Case No. 18,372-X on January 21, 1949. (R. 39). Intervener thoroughly prepared the case for trial and tried the case in the Circuit Court of Jefferson County, Alabama, on September 28, 29, and 30, 1949 before a judge and jury. (R. 33, 34). A settlement was agreed upon immediately before submission of the case to the jury in the amount of Thirty Seven Thousand Five Hundred Dollars ($37,500.00) for which judgment was entered on October 3, 1949. (R. 34). Expenses of Six Hundred Eleven Dollars and Sixty-Seven Cents ($611.67) were paid in furtherance of the prosecution of Case No. 18, 372-X. (R. 38). The *pro rata* share of such expenses which intervener and petitioner assert should be charged against the fund in this case is Nineteen Dollars and Seventy Five Cents ($19.75). The reasonable attorney's fee of Three Hundred Three Dollars and Thirty One Cents ($303.31) (25% of $1213.25) is claimed by petitioner and intervener against the fund in court in the instant case. (R. 6, 7). No attorney's fee has been paid to intervener on the Twelve Hundred Thirteen Dollars and Twenty Five Cents ($1213.25)

which was withheld from payment by the railroad company on the judgment in case No. 18, 372-X and later paid to the Register in this interpleader suit. (R. 38).

The Court below affirmed a judgment of the trial Court awarding the entire fund of Twelve Hundred Thirteen Dollars and Twenty Five Cents ($1213.25) to the respondent. (R. 82, 90, 92).

JURISDICTIONAL STATEMENT

The Court below, the Supreme Court of Alabama, decided a Federal question of substance not heretofore determined by this Court involving the interpretation of Sec. 12 (o) of the Railroad Unemployment Insurance Act, Title 45, U. S. C. A., Sec. 362 (o). (Appendix A).

The statutory authority under which jurisdiction of this Court is invoked is Title 28, U. S. C. A., Sec. 1257.

The date of the judgment to be reviewed is November 23, 1951 (erroneously stated in printed record as November 21, 1951) (R. 92).

QUESTION PRESENTED

The sole question here presented is as follows: Should the injured railroad employee or the Railroad Retirement Board bear the proportionate share of attorney's fees and other expenses necessarily incurred in recovering money for the benefit of the Railroad Retirement Board under Sec. 12 (o) of the Railroad Unemployment Insurance Act, Title 45, U. S. C. A., Sec. 362 (o).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Court below has decided a Federal question of substance not heretofore determined by this Court. The Court below in declining to charge the fund recovered for the benefit of the Railroad Retirement Board with any attorney's fee or other expenses necessarily incurred in the recovery of such fund placed a construction on the statute involved, Sec. 12 (o) of the Railroad Unemployment Insurance Act, Title 45, U. S. C. A., Sec. 362 (o), less favorable to the injured employee than the construction placed upon the same statute by the administering agency, the Railroad Retirement Board. The result of the interpretation placed upon the statute by the Court below is to deny the injured railroad employee the full benefits intended by Congress under the Federal Railroad Unemployment Insurance Act. The interpretation of this statute necessarily affects a large number of railroad employees annually. In the latest available Annual Report of the Railroad Retirement Board for the fiscal year ended June 30, 1950 it is stated that out of sickness benefits paid to 144,480 railroad employees, the Railroad Retirement Board effected a complete reimbursement in 3810 cases and a partial reimbursement in 600 cases due to settlement for personal injury. (See Table C-31, Sickness Benefits, p. 157, Annual Report 1950, Railroad Retirement Board; Appendix B).

WHEREFORE, your petitioners pray that a writ of *certiorari* issue under the seal of this Court to the Supreme Court of Alabama commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court had in the case numbered and entitled on its Docket No. 6 Div. 234 David D. Lewis, appellant, v. Railroad Retirement Board, appellee; Jackson, Rives & Pettus, intervener and appellant, to the end that this case may be reviewed and

determined by this Court as provided by law and the judgment of the Supreme Court of Alabama be reversed by this Court and for such further relief as this Court may deem proper.

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DAVID D. LEWIS and
JACKSON, RIVES & PETTUS

JACKSON, RIVES, PETTUS
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Birmingham, Alabama
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No.....

DAVID D. LEWIS and JACKSON, RIVES and PETTUS,
Petitioners,
(DAVID D. LEWIS—*Appellant Below)*
(JACKSON, RIVES and PETTUS—*Appellant and Intervener Below)*
versus
RAILROAD RETIREMENT BOARD, *Respondent*
(Appellee Below)

BRIEF IN SUPPORT OF THE PETITION FOR THE WRIT OF *CERTIORARI* TO THE SUPREME COURT OF ALABAMA

OPINIONS OF COURTS BELOW

The opinion of the Supreme Court of Alabama (R. 82) is reported in.....Ala....., 54 So. 2d 777. The trial Court rendered no opinion.

JURISDICTION

The Court below has decided a Federal question of substance not heretofore determined by this Court involving the construction of Sec. 12 (o) of the Railroad Unemployment Insurance Act, Title 45, U. S. C. A., Sec. 362 (o). (See Appendix A).

STATEMENT OF THE CASE

The statement of the case in the foregoing Petition under the heading Summary Statement of the Matter Involved is herewith adopted.

SPECIFICATION OF ERRORS

1. The Court below erred in holding that respondent is entitled to the entire fund of $1213.25 under its lien without payment of a reasonable attorney's fee and other expenses incurred in recovery of such fund.

2. The Court below erred in holding that petitioner and intervener were not entitled to a charge of a reasonable attorney's fee and other expenses incurred in the recovery of the fund of $1213.25 prior to the satisfaction of the lien of respondent against such fund.

ARGUMENT

The only question involved is whether the injured railroad employee or the Railroad Retirement Board pays the attorney's fee and other expenses necessarily incurred in the recovery of money for the benefit of the Railroad Retirement Board under Sec. 12 (o) of the Railroad Unemployment Insurance Act, Title 45, U. S. C. A., Sec. 362 (o). The statute reads as follows:

> "(o) Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days

of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement."

In its opinion the Court below decided that under the above quoted statute the injured railroad employee must always bear the attorney's fee and other expenses necessarily incurred in the recovery of money for the benefit of the Railroad Retirement Board regardless of the amount recovered. (R. 88-90). Even the respondent Railroad Retirement Board does not argue for such a stringent interpretation. In the oral argument in the Court below, counsel for the respondent stated that the respondent in administering the statute in question took the position that the attorney's fee and other expenses incurred in recovering money for personal injuries which were subject to the lien should not be considered unless the amount recovered was equal to or less than the amount of the lien claimed. In the latter event the amount of the lien of the Railroad Retirement Board would be diminished by the attorney's fee and other expenses, if any, necessarily incurred in recovering the money. To illustrate respondent's position: *If* in the instant case the recovery of petitioner against the railroad company for personal injuries were only $1213.25, the amount of respondent's lien, then the respondent would consider the attorney's fee and other expenses a proper charge ahead of its lien. On the other hand, where, as in the instant case, the amount of the recovery exceeds the amount of the lien claimed by respondent, then respondent does not consider the attorney's fee and other expenses as a proper charge to diminish the amount of its lien.

The position of petitioner and intervener is that regard-

less of the amount recovered, any attorney's fee and other expenses necessarily incurred to effect the recovery is a proper charge diminishing the amount subject to the lien of the Railroad Retirement Board *pro tanto.*

In summary, the Court below takes the position that under the statute in question attorney's fees and other expenses incurred by the injured employee are never a proper charge to diminish the amount of the lien of the Railroad Retirement Board against the fund recovered for its benefit while the petitioner and intervener contend that such necessary fees and expenses are always a proper charge diminishing the amount of such lien. Respondent's position is that the attorney's fees and other expenses incurred by the injured employee are not a proper charge to diminish the amount of the lien of the Board unless the amount recovered by the injured employee is equal to or less than the amount of the lien. The construction placed upon the statute by the petitioner and intervener is fair in all cases whereas the construction placed upon the statute by the respondent discriminates against the badly injured employee. The construction placed upon the statute by the Court below discriminates against all injured employees.

In the instant case, for example, the attorney's fee and expenses for prosecuting the injured employee's claim against the railroad company are incurred by the injured employee regardless of whether the amount of his recovery against the railroad company is $1213.25 or $37,500.00. Had petitioner's recovery in the instant case been only $1213.25, the amount of respondent's lien, then it is clear that the attorney's fee and other expenditures necessary for effecting such recovery would have been entirely for respondent's benefit alone. The fact that—by reason of his severe injuries—petitioner recovered $37,500.00 should not obscure the fact that the part of such sum recovered for respondent's benefit, namely, $1213.25 remains the same. The reason that petitioner recovered more than

$1213.25 is because he had severe permanent personal injuries. Petitioner, on account of his severe injuries needs the excess of his recovery over $1213.25 to live on. It is not right for him to be forced to take his money to pay an attorney's fee and expenses incurred in recovering the $1213.25 for respondent. The fact that the injured employee obtains more money for his injuries than the amount of the lien claimed by the Railroad Retirement Board, is evidence only that his injuries have been so severe that he needs and is entitled to the additional money for his past suffering and loss of future earnings. There is no reason for him to have to dip into his share of the recovery in order to give the Railroad Retirement Board a free ride. The expense of creating a fund of $1213.25, the amount of the lien claimed by the Railroad Retirement Board in this case, is the same so far as the attorney's fee is concerned, whether the recovery from the railroad company is $1213.25 or $37,500.00.

It is apparent that the principal purpose of the Railroad Unemployment Insurance Act is to protect railroad employees. It is not the purpose of that Act to deal with them in a niggardly fashion. The reimbursement provision contained in Sec. 12 (o) of the Railroad Unemployment Insurance Act, Title 45, U. S. C. A., Sec. 362 (o), only comes into play where the injured employee recovers damages for his injury. If petitioner had not recovered for his personal injuries from the railroad company, the Railroad Retirement Board would not have been entitled to any reimbursement for the sickness benefits in the amount of $1213.25 which had been paid to him. In the Railroad Retirement Board Annual Report for the fiscal year ended June 30, 1950 it is reported that there was no reimbursement of any degree in 128,970 cases in which sickness benefits were paid during 1949-1950. A partial reimbursement was effected by the Board in 10,890 cases and complete re-

imbursement was effected in 4620 cases from all sources. (See Table C-31, Sickness Benefits, page 157, Annual Report 1950, Railroad Retirement Board; Appendix B). Where, as in the instant case, the injured employee is obligated for an attorney's fee to create the fund out of which the reimbursement is claimed, it is in keeping with the intent of Congress under the Act to charge that fund with the attorney's fee and other expenses necessarily incurred in the creation of the fund.

The Court below refused to apply a principle in the instant case which was succinctly stated in one of its prior decisions as follows:

> ". . . That principle is that a complainant in equity . . . who has *created at his own expense or brought into court* a fund in which others may share, may have paid to him, or sometimes directly to his attorney, an attorney's fee for such services. . . . " (Emphasis supplied).
>
> *Penney v. Pritchard & McCall*, 255 Ala. 13, 17, 49 So. 2d 782.

In the instant case petitioner has created and brought into Court a fund of $1213.25 upon which respondent claims a lien as reimbursement for sickness benefits paid. Why should respondent be relieved of its fair *pro rata* share of the expense incurred in creating the fund? Respondent's inchoate claim remains a nullity until petitioner has created the fund by effecting a recovery against the tortfeasor. If petitioner created the fund without expense, respondent is entitled to reimbursement in full. Contrariwise, if petitioner incurs expense in the creation of the fund, respondent should bear its fair share of the expense incurred in the creation of the fund for its benefit.

The principle of the *Penney* Case (supra) while an equitable one is not confined in its application to equity cases. It is analogous to an action at law where the insurer has been subrogated to the right of the injured party

against a third party tortfeasor. The insured may sue for his own benefit, or for the benefit of the insurer, or the insurer may sue the wrongdoer in the name of the insured for the full damages naturally and proximately resulting to the insured from the wrong. *Coffman v. Louisville & Nashville Railroad Company*, 184 Ala. 474, 63 So. 527; *Aetna Insurance Company v. Hann*, 196 Ala. 234, 72 So. 48; *Southern Railroad Company v. Stonewall Insurance Company*, 163 Ala. 161, 50 So. 940; *Collins v. Mobile & Ohio Railroad Company*, 210 Ala. 234, 97 So. 631. See also: *Schaff v. Coyle*, 121 Okla. 228, 249 P. 947; *Home Ins. Co. v. Northwestern Packet Co.*, 32 Iowa 223; Annotation: "Insurance—Proper Plaintiff," 96 A. L. R. 864.

By analogy the Railroad Retirement Board would have the same right to sue as the insurer would have by way of subrogation against the tortfeasor. In the event the Railroad Retirement Board brought suit either in its own name or in the name of the injured railroad employee to establish its lien for $1213.25 for sickness benefits paid, the Board would necessarily incur attorney's fees and other expenses in connection with such suit. Where, as in the instant case, the railroad employee brings suit in his own name, the result of which benefits the Railroad Retirement Board, why should the Board not bear its just and proportionate share of the expenses involved in such a suit? The answer is obviously that there is no reason to relieve the Railroad Retirement Board of its proportionate share of the expenses of such a suit, the result of which, inures to the monetary advantage of the Railroad Retirement Board. Certainly the Railroad Retirement Board should stand in no better position than an insurer who claims as *subrogee* a part of the recovery of an insured resulting from a suit brought by the insured against a tortfeasor.

Svea Assurance Company of Gothenberg, Sweden v. Packham, 48 Atl. 359, 92 Md. 464, 52 L. R. A. 95;

Hayward v. State Farm Mutual Automobile Ins. Co., 212 Minn. 500, 4 N. W. 2d 316, 140 A. L. R. 1236; *General Exchange Ins. Corporation v. Driscoll*, 315 Mass. 360, 52 N. E. 2d 970.

In *Hayward v. State Farm Mutual Auto. Ins. Co.* (supra) the insured had previously recovered from the tortfeasor for personal injuries and damages to his automobile after the insurer had paid the insured for damage to his automobile. In holding that the insured was liable to insurer for the damages recovered by the insured from the tortfeasor for the automobile, the Court recognized that insurer's right to reimbursement was subject to a charge for its proportionate share of the attorney's fee in the following language:

> "The company has credited plaintiff with the amount it received for the old car which was turned over to it and *its proportionate amount* of attorney's fees, but it would be error to charge against the company the cost of expert witnesses to the personal injuries. That expense had no relation to the phase of the case relating to car damage." (Emphasis supplied).

Hayward v. State Farm Mutual Automobile Ins. Co., 212 Minn. 500, 4 N. W. 2d 316, 319.

In the annotation of the last cited case in 140 A. L. R. 1241, at page 1246, it is stated:

> " . . . the recovery (of the insured for personal injuries and property damage) will be presumed to include the full amount of the property damage and the insurer must be permitted to recover the full amount paid by it under the policy . . . *less any expenses incurred by the insured in securing the recovery against the wrongdoer.*" (Emphasis supplied).

The recovery of the injured employee in the instant case for the benefit of the Railroad Retirement Board is pre-

cisely analogous to the recovery by the insured for the benefit of the insurer in *Hayward v. State Farm Mutual Automobile Insurance Company* (supra) and similar cases. We insist that the same rule should apply to the Railroad Retirement Board. The Board's recovery should be the sickness benefits paid *less expenses incurred (by the injured railroad employee) in securing the recovery against the wrongdoer.*

It is obvious that Congress in passing the Railroad Unemployment Insurance Act was motivated by the laudable purpose of assisting railroad employees including particularly those who have been injured. Under Sec. 12 (o) of the Railroad Unemployment Insurance Act, the Railroad Retirement Board does not have any lien or right to reimbursement unless the injured employee recovers from a third party tortfeasor. Respondent concedes that attorneys' fees and expenses are to be taken into account where the right to reimbursement for which the lien is claimed does not exceed the amount of the recovery. But it takes the position that the attorneys' fees and other expenses incurred in the recovery are not to be taken into account where the recovery exceeds the amount claimed as reimbursement by the Railroad Retirement Board. This rule while recognizing in part the fair principle that attorneys' fees and other expenses are to be taken into account, nevertheless patently discriminates against the badly injured employee whose recovery against the third party tortfeasor exceeds the amount of the sickness benefits which have been paid him. There is no rational basis for discrimination in favor of the lightly injured employee as against the seriously injured employee. The seriously injured employee, despite the fact that his recovery from the tortfeasor is larger, is less able to pay the attorney's fee and other expenses out of his own pocket than the lightly injured employee. The money which the seriously injured employee recovers is necessarily based on the theory that

the compensatory damages received must last him for a long time and perhaps for life. It therefore follows that he should not be charged with paying the attorney's fee and expenses for money recovered for the benefit of the Railroad Retirement Board. The Railroad Retirement Board should certainly stand in no better position than an insurance company enforcing a subrogation claim. It is, therefore, submitted that the decree of the Court below should be reversed and a decree rendered in this Court charging the fund with a proportionate share of the attorney's fees and expenses.

Respectfully submitted,

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APPENDIX A

Sec. 12 (o) of the Railroad Unemployment Insurance Act, Title 45, U. S. C. A., Sec. 362 (o) reads as follows:

"(o) Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement."

APPENDIX B

Table C-31, Page 157, Annual Report 1950, Railroad Retirement Board, reads as follows:

TABLE C-31. Sickness benefits: Employees paid benefits and number with benefits partially or completely recovered, by reason for recovery and by age, for sickness in benefit year 1949-50.

Age on birthday in 1949	Total[1]	Partial recovery due to—			Complete recovery due to—		
		Total	Other social insurance benefits	Settlement for personal injury	Total	Other social insurance benefits	Settlement for personal injury
Total	144,480	10,890	10,290	600	4,620	810	3,810
Under 20	450	0	0	0	0	0	0
20-24	4,980	0	0	0	140	0	140
25-29	6,760	50	20	30	300	0	300
30-34	8,910	70	30	40	380	20	360
35-39	11,120	90	40	50	410	0	410
40-44	13,040	250	200	50	500	10	490
45-49	17,710	490	390	100	520	20	500
50-54	20,430	1,200	1,120	80	560	70	490
55-59	23,210	2,070	1,940	130	610	170	440
60-64	23,840	3,440	3,380	60	800	340	460
65-69	11,330	2,400	2,360	40	320	160	160
70 and over	2,700	830	810	20	80	20	60

[1]Includes employees whose benefits were completely recovered.

NOTE.—Based on 10-percent sample of beneficiaries. Excludes maternity beneficiaries. A zero indicates no cases in sample.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 594

DAVID D. LEWIS AND JACKSON, RIVES AND PETTUS, PETITIONERS

v.

RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Alabama (R. 82) is unofficially reported in 54 So. 2d 777.

JURISDICTION

The judgment of the Supreme Court of Alabama (R. 90) was entered on October 4, 1951. A motion for a rehearing was denied on November 23, 1951 (R. 92). By order of the Chief Justice dated February 14, 1952, the time for filing a petition for a

writ of certiorari was extended to March 15, 1952 (R. 94). The petition for a writ of certiorari was filed February 18, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Under Section 12(o) of the Railroad Unemployment Insurance Act, as amended (60 Stat. 741, 45 U.S.C. 362(o)), the Railroad Retirement Board is entitled to be reimbursed from any sum or damages recovered by an employee through suit, compromise, settlement, or judgment on account of an infirmity, to the extent of the benefits paid by the Board to the employee on account of such infirmity.

The question presented is whether the amount of reimbursement to which the Board is entitled should be reduced by the proportionate share of the costs and attorneys' fees incurred by the employee in recovering damages for his infirmity, even though the net amount recovered by the employee exceeds the reimbursement due the Board.

STATUTE INVOLVED

Section 12(o) of the Railroad Unemployment Insurance Act, 52 Stat. 1107, as amended, 60 Stat. 741, 45 U.S.C. 362(o), reads as follows:

> (o) Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or

other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement.

STATEMENT

This is an action arising out of a bill of interpleader brought by petitioner David D. Lewis against the Railroad Retirement Board, respondent, and the Louisville and Nashville Railroad Company, a cross-complainant in the lower court, asking the court to award a fund in controversy of $1213.25, in possession of the Railroad, to the petitioner or, in the alternative, if the court should hold that the Board has an interest in the fund, allow petitioner a proportionate share of the fund as reimbursement for attorneys' fees and other expenses incurred in obtaining the judgment from which the Board seeks reimbursement (R. 4-7). Petitioners Jackson, Rives and Pettus (hereafter sometimes referred to as intervenors) intervened (R. 23-25) claiming a portion of the above fund as legal fees and expenses incurred in the prosecution

of petitioner Lewis' suit which resulted in the judgment from which the Board seeks reimbursement. The Railroad company paid the amount in dispute into the registry of the trial court for its determination as to ownership and proper disposition (R. 16-17). The facts leading up to the dispute are as follows:

Petitioner Lewis was injured on February 25, 1948, while engaged in the discharge of his duties as foreman of a switching crew for the Louisville and Nashville Railroad Company (R. 4, 15, 68). Petitioner filed his application for sickness benefits under the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U.S.C. 351, on March 2, 1948 (R. 11). Under the provisions of the Act, the Board began payments to petitioner on account of his injury dating from February 26, 1948 (R. 56). These payments continued with a brief interruption, provided by the Act, through September, 1949, with petitioner receiving a total of $1213.25 in benefits (R. 92-93). On August 13, 1948, the Railroad Retirement Board sent notice, as required by the Act, to the comptroller of the Louisville and Nashville Railroad Company that under Section 12(o) of the Act, the Board had a lien to the extent of its benefit payments to petitioner on any sum payable by the Railroad on account of liability based on petitioner's injuries (R. 18, 48).

On January 20, 1949, petitioner Lewis retained the firm of Jackson, Rives and Pettus,

intervenors below and petitioners here, with reference to employment as his attorneys in his civil action for personal injuries against the Louisville and Nashville Railroad Company (R. 29). Intervenors filed their complaint on behalf of petitioner on January 21, 1949 (R. 23). On October 3, 1949, a consent judgment in the sum of $37,500 was entered in favor of complainant and against the Louisville and Nashville Railroad Company in the Circuit Court for the Tenth Judicial Circuit of Alabama (R. 4-5). In response to an inquiry from the Louisville and Nashville Railroad Company requesting information concerning the amount of benefits paid by the Board to petitioner (R. 51), the Board, on October 13, 1949, advised the Railroad that the correct amount paid to petitioner was $1213.25 (R. 52).

Subsequent to the entry of judgment in the above civil action, the Louisville and Nashville Railroad Company paid to the Clerk of the Circuit Court for the Tenth Judicial Circuit of Alabama the sum of $36,286.75, withholding $1213.25 from the total judgment of $37,500 because of the claim of the Railroad Retirement Board (R. 16, 34).[1] Petitioner Lewis then filed his bill of interpleader in equity, on January 13, 1950 in the Circuit Court of

[1] Intervenors distributed the $36,286.75 recovered by them from the Clerk of Court by deducting and paying to the firm $611.67 for expenses, by taking as a fee the sum of $8918.77 (25% of the difference between $36,286.75 and $611.67) and delivering the balance of the proceeds of $26,756.31 to petitioner Lewis (R. 38, 43-44).

Jefferson County, Alabama, asking for disposition of the disputed sum in his favor (R. 4). The Louisville and Nashville Railroad Company paid the sum into the registry of the Circuit Court of Jefferson County of Alabama for proper disposition (R. 17).

After hearing testimony by respondent and intervenor as to their rights to the disputed sum, the Circuit Court held that neither petitioner nor intervenors had any right, title or interest in the $1213.25 and that the entire sum is payable to the Railroad Retirement Board (R. 72-73). On appeal, the Supreme Court of Alabama affirmed (R. 82).

ARGUMENT

Petitioner Lewis and the intervenors raise two arguments in support of their contention that they have a right to attorneys' fees and expenses from the sum due the Railroad Retirement Board as reimbursement for the benefits paid petitioner Lewis. First, they contend that the administrative policy of the Board discriminates against the seriously injured employee, and secondly, that intervenors are entitled to reasonable attorneys' fees and other expenses because they were "incurred in the recovery of money for the benefit of the Railroad Retirement Board" (Pet. p. 10). Both arguments misconstrue the policy of the Board and the nature of the Board's right to reimbursement.

1. Under Section 12(o) of the Railroad Unemployment Insurance Act, *supra*, pp. 2-3, the Board

is entitled to reimbursement in the event a third party is held liable for inflicting the disability upon which a claim for sickness benefits is predicated, "to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity."[2] In determining the net amount inuring to the benefit of the individual from a personal injury settlement or recovery, the Board deducts medical, hospital and legal expenses incurred by him in connection with the infirmity from the total amount of the settlement or recovery. The Board considers itself entitled to reimbursement only from the net amount. However, if the net amount is as much as, or more than, the amount of the benefits which it has paid, the Board must, according to the provisions of Section 12(o) of the Act, be reimbursed in the full amount of the benefits.

The application of these principles to the instant case is clear. Judgment was entered for $37,500, an amount greatly in excess of all medical, hospital and legal expenses, and the net amount inuring to the benefit of petitioner Lewis is considerably

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[2] In commenting on the intended application of Section 12(o), the Senate Report on the amendments to the Railroad Unemployment Insurance Act which added the Section stated:

> The fact that a third party may be liable to the employee for inflicting the disability upon which a claim for sickness benefits is predicated does not affect the validity of the claim for benefits, but the Board is entitled to reimbursement from any payment in discharge of such liability to the extent of the sickness benefits paid under these circumstances, and upon notice to the person liable obtains a lien securing its right of reimbursement. [Sen. Rept. 1710, Part 2, p. 25, 79th Cong., 2d Sess.]

more than the amount of the benefits he recovered from the Board. The Board is therefore entitled to reimbursement in the full amount of the benefits.

The administrative policy of the Board is applicable equally to all injured employees. Each employee can deduct medical, hospital and legal expenses from the amount of his personal injury recovery before arriving at a net amount from which the Board will receive its reimbursement. The policy insures the right of each employee to legal expenses before the Board applies its lien.[3] Petitioner's and intervenors' argument that the policy of the Board is discriminatory is completely unsupported.

2. Petitioners' second argument, that the injured employee is paying the attorneys' fees and other expenses incurred in the recovery of money for the benefit of the Railroad Retirement Board (Pet. p. 10), is equally misleading. Their argument is based on the false proposition that there are two funds in the instant case, one for the benefit of the injured employee and a second for the benefit of the Board. There is, however, only a single fund of $37,500. Petitioner Lewis and the inter-

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[3] In the instant case, petitioner's contingent fee legal contract with intervenors awards intervenors 25% of the amount petitioner actually receives (R. 45). If petitioner and intervenors were to prevail in the instant case, petitioner would realize nothing out of the additional recovery. Petitioner does not have to "dip into his share of the recovery," as intervenors suggest (Pet. p. 13), to enable the Board to be reimbursed for the benefits paid petitioner. nor would he profit from intervenors' construction.

venors have not created a separate fund for the benefit of the Board but rather a single fund from which they are exacting a fee and from which the Board is to be reimbursed. The litigation by petitioner was for the sole purpose of creating the single fund of $37,500 and was in no way for the benefit of the Board. As the court below stated (R. 89):

> The services rendered by the attorneys in the suit in which the judgment against the railroad company was procured were services rendered in behalf of a client, the complainant in the cause, and his individual interest under a contract made only between complainant and intervenors. It was not a service rendered in behalf of the Railroad Retirement Board, although it resulted incidentally in benefit to the Railroad Retirement Board. As a result of the views which we have here expressed, the allowance of a fee cannot be sustained on a theory of services rendered for the common benefit of all the parties.

Petitioners' entire argument that they created a fund for the benefit of others and that the Board should share in the expense of its creation overlooks the relationship between the parties in this case. Here, the complainant was the recipient of benefits administered by the Board which the law required him to reimburse. The action resulting in the judgment from which the reimbursement was made, was an action in a law court and not in

equity. It was not a receivership; nor was it filed in aid of or in connection with an equity proceeding. The benefit recovered by the Board from the civil suit instituted by petitioner was only incidental to that suit and is not a basis for charging a fee. *Standard Lumber Co.* v. *Interstate Trust Co.*, 82 F. 2d 346 (C.A. 5), certiorari denied, 299 U.S. 545; *Huff* v. *Bidwell*, 195 Fed. 430 (C.A. 5); *Lea* v. *Paterson Sav. Inst.*, 142 F. 2d 932 (C.A. 5). Petitioners had no authorization to represent the Board and at no time undertook to do so.[4]

The cases cited by petitioners to support their contention are applicable to the right of attorneys' fees incurred in the administration of a trust. But here, as the court below stated (R. 89), "The suit brought by complainant against the Louisville and Nashville Railroad Company was not in any sense a class suit or brought for the benefit of others. The complainant sought only to establish his own rights. The incidental benefit resulting to the Railroad Retirement Board is not a basis for charging the Railroad Retirement Board with the creation of a fund for its benefit."[5]

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[4] In *Lea* v. *Paterson Sav. Inst.*, 142 F. 2d 932, 934 (C.A. 5), the Court of Appeals for the Fifth Circuit, in denying an application for attorneys' fees, stated: "But it [the rule for allowing attorneys' fees] is only so applied when the circumstances are such as that parties sought to be held liable for fees can be said to have either expressly or impliedly accepted the attorneyship and its benefits."

[5] In the court below, intervenors urged that their attorneys' lien preceded the Board's lien, and was, for that reason, superior to it. The court below held against intervenors, and they do not press that argument here.

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decisions and further review is not warranted. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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